

Via Electronic Mail to WR401Program@waterboards.ca.gov

October 11, 2018

Ms. Michelle Siebal
State Water Resources Control Board
Division of Water Rights – Water Quality Certification Program
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Southern Californian Edison Company's Comments on the Draft California Environmental Quality Act Supplement for the Six Big Creek Hydroelectric Projects, Federal Energy Regulatory Commission Project Nos. 67, 120, 2085, 2086, 2174, and 2175

Dear Ms. Siebal:

Southern California Edison Company (SCE) hereby respectfully submits comments on the Draft California Environmental Quality Act (CEQA) Supplement issued by the State Water Resources Control Board (State Water Board) on August 13, 2018 for SCE's Six Big Creek Hydroelectric Projects, Federal Energy Regulatory Commission (FERC) Project Nos. 67, 120, 2085, 2086, 2174, and 2175. SCE will also submit comments on the State Water Board's Draft Water Quality Certification for the Six Big Creek Projects in a separate filing prior to the close of the comment period on December 7, 2018.

Overall, the Draft CEQA Supplement is inadequate and deprives the public of a meaningful opportunity to comment on the appropriateness and implications of the conditions proposed by the State Water Board. SCE requests that the State Water Board revise and recirculate, for public review, the Draft CEQA Supplement to address the following issues:

- Incomplete project description;
- Failure to properly consult with FERC before relying on FERC's FEIS and Findings of No Significant Impact;
- Deficient CEQA environmental analysis;
 - Lack of a meaningful baseline or threshold of significance
 - Inadequate analysis of CEQA resources
 - Failure to adequately identify and justify mitigation measures

Each issue is described in more detail below.

Incomplete Project Description

The project description (as provided in Section 2.0 of the Draft CEQA Supplement) may be incomplete in that it does not describe the proposed project in a clear and concise manner. SCE specifically requests that the State Water Board revise the project description to clearly articulate the conditions in the Draft 401 Certification under consideration and to thoroughly identify and describe the specific differences between the Draft 401 Certification conditions and the conditions analyzed by FERC under the National Environmental Policy Act (NEPA) in the relicensing proceeding and as agreed upon in the Settlement Agreement.

CEQA Guidelines Section 15124 sets forth the precise requirements necessary for an adequate CEQA project description.¹ Even if a lead agency relies on already-prepared NEPA documents, those documents still must satisfy CEQA Guidelines, including the requirement that the project description is accurate and complete.² “An accurate and complete project description is necessary to fully evaluate the project's potential environmental effects.”³ As held in *County of Inyo v. City of Los Angeles*⁴ (and subsequently codified in Section 15124 of the CEQA Guidelines⁵) an accurate project description is “an essential element of an informative and legally sufficient EIR under CEQA” and the EIR must “describe the proposed project in a way that will be meaningful to the public, to the other reviewing agencies, and to the decision makers.”⁶

As stated in the Draft CEQA Supplement:

“For the purpose of CEQA analysis, the Project being considered by the State Water Board is issuance of a 401 Certification for the re-licensing of the Six Big Creek Hydroelectric Projects, with appropriate conditions to ensure that the Six Big Creek Hydroelectric Projects are operated in a manner that is protective of water quality and beneficial uses of water (Project).”⁷

The CEQA Supplement goes on to define the Project as including the following:⁸

- SCE's Proposed Project as described in its applications to FERC (i.e., Section 5.2 of the Final Environmental Impact Statement (FEIS) for the Big Creek ALP⁹; Section VII of the Final Environmental Assessment (EA) for the Portal Project¹⁰ and Section VII of the EA for the Vermilion Project¹¹);
- U.S. Department of Agriculture, Forest Service (USDA-FS) 4(e) Conditions;
- FERC's Staff Alternatives;
- The terms of the Settlement Agreement; and
- Conditions of the Draft 401 Certification.

However, the Draft 401 Certification includes some conditions that are new or are modified from the conditions described not only in the Settlement Agreement, but also in SCE's Project, USFS

¹ Cal. Code Regs. tit. 14, § 15124.

² See Cal. Code Regs. tit. 14, § 15221(a)(2).

³ *El Dorado Cty. Taxpayers for Quality Growth v. Cty. of El Dorado* (2004) 122 Cal. App. 4th 1591, 1597.

⁴ *County of Inyo v. City of Los Angeles*, (1977) 71 Cal. App. 3d 185.

⁵ Cal. Code Regs. tit. 14, § 15124.

⁶ The Draft CEQA Supplement should meet all the requirements of an EIR because the NEPA document extensively referenced by State Water Board in its analysis is FERC's FEIS for the Big Creek Alternative Licensing Process (ALP) Projects.

⁷ Draft CEQA Supplement, Section 2.0, page 4

⁸ *Id.*

⁹ FERC. 2009. Final Environmental Impact Statement (FEIS) for the Big Creek Projects, Mammoth Pool (FERC Project No. 2085); Big Creek Nos. 2A, 8 and Eastwood (FERC Project No. 67); Big Creek Nos. 1 and 2 (FERC Project No. 2175); and Big Creek No. 3 (FERC Project No. 120). Issued March 13, 2009.

¹⁰FERC. 2006. Final Environmental Assessment (FEA) for the Portal Hydroelectric Project (FERC Project No. 2174). Issued April 27, 2006.

¹¹FERC. 2004. Environmental Assessment (EA) for the Vermilion Valley Hydroelectric Project Issued May 4, 2004.

4(e) conditions, and FERC's FEIS Staff Alternative. These new and modified conditions were not analyzed under NEPA.

The State Water Board does not clarify that these differences would considerably change operations and other factors used in subsequent analyses as compared to those analyzed under NEPA. Considering the complexity of the project and volume of the material incorporated by reference, it is unreasonable to assume that reviewers of the Draft CEQA Supplement can independently discern such differences, which is critical to understanding the project described in the Draft CEQA Supplement.

Failure to Properly Consult with FERC Before Relying on FERC's FEIS and Findings of No Significant Impact

The CEQA Supplement does not adequately describe the necessary steps the State Water Board made with respect to fulfilling the federal agency consultation requirement required when planning to rely on a federal agency's FEIS or Finding of No Significant Impact (FONSI). CEQA Guidelines, Section 15223 provides that "[w]hen it plans to use an [F]EIS or finding of no significant impact or to prepare such a document jointly with a federal agency, the lead agency shall consult as soon as possible with the federal agency."¹² SCE asks that the State Water Board provide additional support in demonstrating compliance with this consultation requirement set forth under CEQA Guidelines, Section 15223.

Here, the CEQA Supplement indicates that there is little evidence that, in planning to rely on FERC's FEIS and FONSI statements, the State Water Board adequately consulted with FERC as required by Section 15223 of the CEQA Guidelines. With respect to the Big Creek ALP Projects FEIS, the CEQA Supplement notes that the "State Water Board staff provided guidance to the Commission on expanding the NEPA analysis to fulfill CEQA requirements. In response, the Commission modified the 2009 FEIS Appendix A"¹³, this "guidance" appears to have been done during a time when the State Water Board had not definitively planned to "use" the FEIS in lieu of an EIR¹⁴. Given that there is no suggestion that the State Water Board subsequently consulted with FERC once it did in fact plan to rely on FERC's FEIS for the Big Creek ALP Projects, this CEQA requirement may not have been fulfilled.

Evidence that the State Water Board consulted with FERC when planning to rely on FERC's Final Environmental Assessments/FONSIs with respect to the Vermilion Valley and Portal Projects is more tenuous. The CEQA Supplement contains no discussion as to what extent the State Water Board consulted with FERC in relying on these FONSIs.¹⁵ And tellingly, neither the Environmental Assessments/FONSI for either the Vermilion Valley Project or Portal Project contains any discussion of its efforts to comply with CEQA.¹⁶

¹² Cal. Code Regs. tit. 14, § 15223; *see also* Cal. Pub. Res. Code § 21083.7, subd. (b)(a).

¹³ Draft CEQA Supplement, Section 1.0, page 3.

¹⁴ *Id.* at 1-8 ("In an effort to present information that may be useful should the Water Board decide to use this EIS for its CEQA purposes, we considered whether issuing new licenses for the Big Creek ALP Projects would have any growth-inducing effects, and determined that it would not.")

¹⁵ *See generally* Draft CEQA Supplement

¹⁶ *See generally* FERC. 2006. Final Environmental Assessment (FEA) for the Portal Hydroelectric Project (FERC Project No. 2174). Issued April 27, 2006; FERC. 2004. Environmental Assessment (EA) for the Vermilion Valley Hydroelectric Project Issued May 4, 2004.

Contrast this with, for example, a January 22, 2018 Notice of Intent to File a License Application filed by Pacific Gas and Electric¹⁷ where the notice indicated that the State Water Board and FERC have noticed joint scoping meetings so that a future EIS could satisfy both NEPA and CEQA in compliance with CEQA Guideline Section 15223. Accordingly, SCE asks that the State Water Board provide greater support in demonstrating that it has fulfilled its consultation requirement with FERC in relying on FERC's FEIS and FEA/FONSI statements.

Deficient CEQA Environmental Analysis

The CEQA environmental analysis presented in Section 3.0 of the Draft CEQA Supplement is incomplete and fails to clearly describe project impacts or to provide justification for proposed conditions in the State Water Board's 401 Certification. SCE requests that the State Water Board develop (and recirculate) a new independent environmental analysis under CEQA to accurately analyze the effects and justification for the 401 Conditions, rather than relying on the NEPA analysis, which did not foresee the substantial changes included in the 401 Conditions.

The Settlement Agreement (analyzed under NEPA) is supported by an extensive administrative record, which includes the 32,000-page License Applications filed by SCE, FERC's Draft EIS (DEIS) and FEIS, and USDA-FS 4(e) conditions. More than 300 collaborative meetings were held with interested parties during the Big Creek ALP proceeding, including State Water Board staff, to develop the Settlement Agreement. SCE and the stakeholders (including the State Water Board) spent years developing the plans and measures that were included in the Settlement Agreement. Furthermore, the plans and measures that are included in the Settlement Agreement are based on data that was derived through years of rigorous studies that were conducted in consultation with all of the stakeholders, including resource agencies, non-governmental agencies (NGOs) and other interested parties. As such, the Settlement Agreement requests that the State Water Board:

“... accept and incorporate, without material modification, all of the measures stated in Appendix A of this Settlement that are necessary for ensuring that the FERC license meets state water quality criteria in the State Water Board's submittal of the Water Quality Certificate to FERC pursuant to the Clean Water Act Section 401. The Parties further request that the State Water Board not include additional conditions in its filing with FERC that address the Resolved Subjects, other than those conditions necessary for the State Water Board to implement the consultation requirements of this Settlement.”¹⁸

Notwithstanding this request, the conditions proposed in the Draft 401 Certification to varying degrees amend and modify (and in some cases conflict with) the conditions described not only in the Settlement Agreement, but also in SCE's Project, USFS 4(e) conditions, and FERC's FEIS

¹⁷ Pacific Gas and Electric Company; Notice of Intent To File License Application, Filing of Pre-Application Document (Pad), Commencement of Pre-Filing Process, and Joint Scoping With the California State Water Resources Control Board; Request for Comments on the Pad and Scoping Document, and Identification of Issues and Associated Study Requests, 83 FR 2982-01.

¹⁸ Section 3.3 of the Big Creek Alternative Licensing Process Hydroelectric Project Settlement Agreement, February 2007.

Staff Alternative.¹⁹ The State Water Board a) fails to disclose in the Draft CEQA Supplement the threshold of significance used to determine project impacts and/or justify the need to modify conditions already evaluated under NEPA including SCE's Proposed Project, USFS 4(e) conditions, FERC's Staff Alternative and the Settlement Agreement; and b) relies heavily on conclusions from the NEPA analysis without sufficiently justifying or addressing differences proposed in the 401 Conditions. Further, in the Draft CEQA Supplement, the brief description of potential Project impacts and justification for modified conditions is limited in nature; absent of any supportive data and analysis; developed without collaboration with the Licensee, Tribes, resource agencies and NGOs; and conflicts with conditions agreed upon in the Settlement Agreement.

Lack of a Meaningful Baseline or Threshold of Significance

The State Water Board omits in the Draft CEQA Supplement the threshold of significance²⁰ used to determine project impacts and/or justify the need to modify conditions already evaluated under NEPA including SCE's Proposed Project, USFS 4(e) conditions, FERC's Staff Alternative and the Settlement Agreement and does not adequately describe why proposed measures beyond those agreed upon in the Settlement Agreement are necessary for the protection of water quality or beneficial uses.

In comments filed on the FERC DEIS, the State Water Board stated:

“The California Environmental Quality Act (CEQA) environmental baselines will also be the existing environmental condition under the No-Action Alternative, where the Big Creek Hydroelectric Projects would continue to operate under the terms and conditions of the existing license. It is important to realize that in an analysis of a pre-existing hydroelectric project, reauthorization the project is not likely to yield many significant environmental impacts under CEQA because most of the impacts have already occurred. In other words, when compared to existing conditions, continued operation of the project is unlikely to lead to significant change to the environment.”²¹

The State Water Board did not meet an objective of its CEQA analysis, namely the “determination of the level of significance for all impacts identified for CEQA resource areas.”²² The Draft CEQA Supplement refers to Table 4, Table 5, and Table 6²³ to determine level of significance of potential impacts associated with implementation of the Project for each CEQA resource area. However, these tables only describe potential impacts of measures from SCE's Proposed Project that were analyzed in FERC's FEIS for the Six Big Creek Hydroelectric Projects. The tables and supportive rationale do not analyze the conditions in the Draft 401 Certification under consideration by the State Water Board. Reusing the same tables from the NEPA analysis with minor edits as an

¹⁹ The Draft 401 Certification acknowledges such conflicts and the text of Condition 1 states that “to the extent that the conditions of this certification and the incorporated provisions of the Big Creek ALP Settlement Agreement are inconsistent, the Licensee shall comply with the conditions of this certification.”

²⁰ Cal. Code Regs. tit. 14, § 15064.7, subd. (a) (“Each public agency is encouraged to develop and publish thresholds of significance that the agency uses in the determination of the significance of environmental effects.”)

²¹ Letter dated November 3, 2008 from the State Water Board to FERC providing comments on the Draft EIS for the Six Big Creek Projects.

²² Draft CEQA Supplement, Section 3.0, page 5.

²³ Pages 24 through 34 of the Draft CEQA Supplement.

updated analysis is conclusory in nature, insufficient to inform the public, and not supported by information in the extensive administrative record.

The State Water Board has failed to provide a detailed description (supported by technical information in the administrative record) of any adverse effects on water quality or beneficial uses from existing operations of the Six Big Creek Hydroelectric Projects (baseline) such that the additional/modified conditions proposed in the Draft 401 Certification are warranted. As a result of this lack of justification, the proposed conditions in the 401 Certification appear to be arbitrary and capricious. Accordingly, we request that the State Water Board provide more detailed support, including disclosure of baseline/thresholds of significance, which may provide a more meaningful analysis of the impacts of SCE's Proposed Project.

Inadequate Analysis of CEQA Resources

We acknowledge and commend the State Water Board in adding Section 3.1 to the Draft CEQA Supplement to analyze of impacts to Agriculture and Forest Resources; Greenhouse Gas Emissions; Hazards and Hazardous Materials; Transportation/Traffic; and Utilities and Service Systems. However, the modifications to the Settlement Agreement in the Draft 401 Certification affect resources areas previously analyzed under NEPA, thereby requiring further analysis under CEQA regarding identification of impacts and appropriateness of proposed new measures. SCE requests that the State Water Board provide adequate analysis under CEQA documenting: (1) impacts from existing or proposed operations that are potentially significant and require mitigation to reduce to less than significant levels; (2) why the existing Settlement Agreement conditions and project features are insufficient in protecting water quality and beneficial uses (including establishment of thresholds of significance for these determinations, as required under CEQA); and, (3) how the new conditions are necessary to protect water quality/beneficial uses. Based on the revised conditions provided in the 401 Certification, the following resource areas are potentially affected and, therefore, should be individually evaluated under CEQA:

- Biological Resources (including aquatic and terrestrial resources);
- Geological and Soils;
- Hydrology and Water Quality;
- Recreation; and
- Transportation.

With respect to Section 3.3, this section minimizes and thereby fails to adequately represent to the public the measures not adequately analyzed under NEPA. Section 3.3 identifies and analyzes only four conditions including: (1) Jackass Meadows sedge bed restoration; (2) Operational release limitations for Mono Creek from April 16–June 15; (3) Ramping rates; (4) Big Creek Fish Hatchery feasibility investigations. The criteria used in evaluating the conditions included in Section 3.3 are not identified; but clearly the State Water Board does not consider the effects on resources of modified and new conditions identified in the Draft 401 Certification compared to conditions in the Settlement Agreement analyzed under NEPA (see previous paragraph). Of the four conditions addressed in Section 3.3, two conditions (Jackass Meadows sedge bed restoration²⁴ and Big Creek Fish Hatchery feasibility investigations²⁵) are part of a Non-FERC Settlement Agreement and are not necessary for operations or maintenance of the Six Big

²⁴ Draft CEQA Supplement, Section 3.3.1, page 37

²⁵ Draft CEQA Supplement, Section 3.3.3, page 38

Creek Projects. Therefore, these conditions are not under FERC jurisdiction nor subject to State Water Board 401 authority under the relicensing proceeding and should not be included in the CEQA analysis. The operational release limitation for Mono Creek²⁶ was included in the Settlement Agreement and as a USFS Federal Power Act section 4(e) condition and therefore was previously analyzed under NEPA. Revisions to Mono Creek operations in Condition 5 of the Draft 401 Certification are limited to additional consultation with State Water Board, hardly warranting additional CEQA analysis.

Failure to Adequately Identify and Justify Mitigation Measures

When relying on NEPA documents in lieu of an EIR to satisfy CEQA, CEQA Guidelines, Section 15221(b) requires that any discussion of mitigation measures must be supplemented to fulfill CEQA's requirements.²⁷ The Draft CEQA Supplement does not sufficiently identify and justify the need for mitigation measures. We acknowledge that the State Water Board has included a rationale for the conditions in Section 6.0 of the Draft 401 Certification. However, the justifications are cursory or speculative in nature, or do not provide sufficient new data or analysis. Therefore, we request that the State Water Board provide a clear connection between (a) the nature and severity of the impact to water quality or beneficial uses considering implementation of previously agreed-upon measures; or (b) the applicability of the new/amended condition in addressing the impact. Section 15126.4 of the CEQA Guidelines requires both an essential nexus between the mitigation measure and a legitimate governmental interest (i.e., protection of water quality)²⁸ and a rough proportionality between the proposed measure and the impact²⁹.

In addition, a clear delineation must be made in the CEQA Supplement between a condition that is a "project feature" versus a "mitigation measure" which is developed in response to a potentially significant impact to water quality. In *Lotus vs. Department of Transportation*³⁰, the court found that an EIR violated CEQA by incorporating proposed mitigation measures into the description of the project, and then determining less-than-significant impacts would occur as a result of those mitigation measures. This created improper short-circuiting of CEQA analytical and disclosure requirements. Therefore, in those cases where the State Water Board is proposing a condition to reduce potentially significant project effects to water quality and beneficial uses to less than significant levels, the condition must be called out as mitigation and included in the Mitigation, Monitoring and Reporting Plan. Since the State Water Board has not included these as "project features" in its project description, either the analysis of the project impacts has concluded an incorrect level of significance or the mitigation measure is unwarranted.

Moreover, in preparing the Draft CEQA Supplement, the State Water Board improperly relied on the FEIS Appendix A Mitigation and Monitoring Summary, which does not include the conditions in the Draft 401 Certification. As provided in CEQA Guidelines Section 15097(a), in order to ensure the mitigation measures and project revisions identified in the CEQA document are implemented, the agency must adopt a mitigation monitoring or reporting program on the revisions

²⁶ Draft CEQA Supplement, Section 3.3.2, page 37

²⁷ Cal. Code Regs. tit. 14, § 15221, subd. (b) ("Because NEPA does not require separate discussion of mitigation measures or growth inducing impacts, these points of analysis will need to be added, supplemented, or identified before the EIS can be used as an EIR.")

²⁸ *Nollan v. California Coastal Commission* (1987), 483 U.S. 825

²⁹ *Dolan v. City of Tigard*, (1994) 512 U.S. 374

³⁰ *Lotus v. Department of Transportation*, (2014) 223 Cal. App. 4th 645

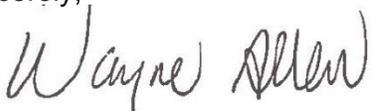
which it has required in the project, and the measures it has imposed to mitigate or avoid significant environmental effects. As stated in the Draft CEQA Supplement, during development of the FERC FEIS, State Water Board staff provided guidance to FERC on expanding the NEPA analysis to fulfill CEQA requirements. In response, FERC modified the FEIS Appendix A, Big Creek ALP Projects Mitigation and Monitoring Summary. But because the FEIS Mitigation and Monitoring Summary did not capture the conditions set forth in the Draft 401 Certification, a revised mitigation, monitoring, and reporting program should be developed that is inclusive of the conditions in the Draft 401 Certification. Thus, we ask for a more comprehensive discussion of mitigation measures, as discussed in Sections 3.1-3.3.

Conclusion

SCE respectfully requests revision of the State Water Board's Draft CEQA Supplement as described above and recirculation of the document for additional public review. As described in Section 15088.5 of the CEQA Guidelines, a lead agency must recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification. "Significant new information" includes those cases where a draft EIR is "basically inadequate and conclusory in nature" thereby precluding meaningful public review and comment³¹ as we feel we have adequately documented in these comments.

SCE is available to discuss our comments with the State Water Board. If you have any questions regarding the comments and/or would like to schedule a meeting to discuss them, please contact me directly at (626) 302-9741 or Wayne.Allen@sce.com.

Sincerely,



Wayne P. Allen
Principal Manager

³¹ *Mountain Lion Coalition v. Fish and Game Commission* (1989) 214 Cal.App.3d 1043